Supreme Court, U.S.
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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

MICHAEL DIANA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The Circuit Court For The Sixth Judicial Circuit, State Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a state trial court may constitutionally direct a convicted defendant, as part of his conditions of probation and sentence, and upon pain of probation revocation, to refrain from creating or possessing any "obscene" material, even for his own use and in the privacy of his home?

II. Whether hand-drawn cartoon images may be adjudged "obscene" and unprotected by the First and Fourteenth Amendments to the United States Constitution when such drawings could not be considered the public portrayal of hard core sexual conduct for its own sake and for commercial gain?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Diana, respectfully prays this Honorable Court for a Writ of Certiorari to review the decision of the Appellate Division of the Circuit Court for the Sixth Judicial Circuit, State of Florida, affirming Petitioner's conviction and sentence for violation of Florida's anti-obscenity statute.

OPINIONS BELOW

The decision of the Appellate Division of the Florida Circuit Court for the Sixth Judicial Circuit affirming in all material respects Petitioner's conviction and sentence for violation of Florida's anti-obscenity statute is not reported but is reprinted in the Appendix to this Petition at A. 1-20.[1] On January 10, 1997, the Florida Second District Court of Appeal denied *per curiam* without opinion Petitioner's petition for writ of certiorari. That decision is not reported but is reprinted in the Appendix at A. 23. The Florida Constitution provides no basis for seeking review in the Florida Supreme Court. The judgment and sentence of the County Court for Pinellas County, Florida, in which Petitioner was charged and convicted, is not reported but is reprinted at A. 32-42.

[1] References to the Appendix are designated "A___."

JURISDICTION

The Florida Second District Court of Appeal denied review of the Circuit Court Appellate Division's order on January 10, 1997. On March 31, 1997, Justice Kennedy extended to May 16, 1997, the time for Petitioner to docket his petition for certiorari in this Court. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I, United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . . "

Amendment IV, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . "

Amendment XIV, § 1, United States Constitution:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

Fla. Stat. § 847.001 (1995) (reproduced in Appendix at A. 29).

Fla. Stat. § 847.011 (1995) (reproduced in Appendix at A. 29-31).[2]

STATEMENT OF THE CASE

A. Statement of the Facts.

In 1991, Michael Diana, a young amateur cartoonist and member of the "zine" movement,[3] began receiving letters from Mike Fiore. Mr. Fiore expressed admiration for Mr. Diana's drawings, which he claimed to have seen at a friend's, and sent a three dollar money order for a copy of "Boiled Angel 7," Mr. Diana's photocopied booklet of cartoon drawings that was shared only through word-of-mouth inquiry like Mr. Fiore's. Mr. Fiore wrote more letters and told Mr. Diana that he recently had moved to the West Coast of Florida from Ft. Lauderdale and was having trouble finding like-minded companionship. He inquired about submitting "a story" to Mr. Diana for publication and about where he could find "video around here." He sympathized with Mr. Diana's romantic woes. Eventually, he sent Mr. Diana another money order and asked for the next issue of Mr. Diana's cartoon booklet, "Boiled Angel Ate." A. 44-54.

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[2] The earlier-dated statutes under which Petitioner was convicted are the same.

[3] "Zine" is a shortened form of "magazine," and refers to a grass-roots network of self-publishers of art and commentary. Perhaps the best-known member of the zine movement is Art Spiegelman, who won a Pulitzer Prize for "Maus," his cartoon epic about the Holocaust.

Then, some fourteen months later, Mr. Diana was arrested. "Mike Fiore" really was James Tezzas, a detective in the Pinellas County, Florida Sheriff's Office.

In March, 1993, Mr. Diana was charged with two misdemeanor counts of publication, sale, or distribution of obscene materials and one count of advertising for sale, publication, or distribution of the same materials, pursuant to Fla. Stat. § 847.011(1). Mr. Diana's pretrial motions were unsuccessful. Trial commenced one year later before a petit jury in the County Court of Pinellas County, and on March 25, 1994, Mr. Diana was found guilty on all three counts. A. 43-45. Mr. Diana was jailed pending sentencing and was not released until March 29, 1994. A. 39.

At sentencing, on March 28, 1994, the Court adjudicated Mr. Diana guilty of the three charges; placed him on probation for three years; imposed a fine of $3,000; ordered a psychiatric evaluation within thirty days; required that Mr. Diana maintain full-time employment "5 days a week, 40 hours a week, at least" while on probation; required that he perform, in addition, eight hours per week of community service while on probation; ordered that he have no contact with persons under the age of eighteen; required that he submit to urinalysis, breathalyser, or blood tests at any time; ordered him to take a course in "journalism ethics and professionalism of journalism"; and ordered that Mr. Diana not possess and "not create in your written [sic] or drawings, *even for your own use*, obscene materials" subject to warrantless, unannounced searches by a probation officer. A. 55-60 (emphasis supplied).

Mr. Diana's post-trial motions were denied, and on May 31, 1994, the County Court stayed the sentence pending appeal, A. 54, after Petitioner already had served jail time.

B. The Proceedings Below.

Petitioner timely appealed to the Appellate Division of the Florida Circuit Court for the Sixth Judicial Circuit. A single-judge appeal panel issued its opinion affirming the conviction and sentence in all material[4] respects on May 31, 1996, A. 1-20, and rehearing was denied. A. 21. Petitioner sought review in the Second District Court of Appeal of Florida, which denied his petition for writ of certiorari without opinion on January 10, 1997. A. 23.

On March 5, 1997, upon motion by Petitioner, the County Court modified the terms of probation in accordance with the Appellate Division's opinion. The County Court reduced the term of probation to two years, reduced the fine to $2,000, ratified the Appellate Division's elimination of the random blood, breath, and urine testing, eliminated the prohibition against Petitioner's contact with minors, and allowed Petitioner to serve his probation in New York, his current state of residence. The County Court left intact the requirement that Petitioner take a journalism ethics course, that he perform community service, that he undergo a psychiatric evaluation,

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[4] The Appellate Division eliminated the drug and alcohol screenings as a condition of probation, A. 14, 19, and reversed the conviction for advertising. A. 11, 19.

that he maintain full-time employment, and that he neither create nor possess obscene materials. The court otherwise refused to reconsider the sentence. A. 24-28.

C. How the Federal Question was Raised.

In response to the criminal charges in the Pinellas County Court Petitioner asserted by motions that the United States Constitution protected his rights to free speech and expression of his religious, political and social views through his cartooning. The County Court denied Petitioner's pretrial motions and motion for judgment of acquittal on those grounds. Petitioner asserted issues on appeal to the Florida Sixth Judicial Circuit Court Appellate Division that his conviction and sentence violated the First, Fourth and Fourteenth Amendments to the United States Constitution. A. 1-20. The single circuit court judge sitting on appeal rejected these contentions, and the Florida Second District Court of Appeal, Petitioner's state court of last resort, denied review without opinion. A. 23.

REASONS FOR GRANTING THE WRIT

Petitioner appears to be the only cartoonist on record in the United States ever incarcerated for the content of his art. In addition, he appears to be the only artist in any medium in America ever to have been prohibited from freely engaging in artistic expression in the privacy of his own home. Because of Florida's peculiarly limited provisions for appellate review, Petitioner's conviction and sentence have yet to be addressed substantively by any

collegial court.[5] Petitioner's conviction and sentence squarely contravene governing precedent of this Court's decisions in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), *Miller v. California*, 413 U.S. 15 (1973), and *Stanley v. Georgia*, 394 U.S. 557 (1969). The case therefore deserves this Court's review. Because the County Court's judgment and sentence intrude too deeply into the exercise of First Amendment freedoms, they should be reversed.

I. The order and judgment prohibiting Petitioner from "possess[ing] or creat[ing]" obscene drawings or writings for two years, subject to warrantless searches for such material by a probation officer, is an unlawful prior restraint on artistic expression that violates the First and Fourteenth Amendments.

A. The prohibition on possession and creation of drawings is overbroad and *per se* invalid.

The judgment of guilt and probation upheld by the Florida Circuit Court in its appellate capacity directs, in the trial court's handwriting, that Petitioner engage in "[n]o possession or creation (drawings or writings) of obscenity" and "probation may search without warrant." From the bench, the trial court directed that Petitioner not even possess such materials "for [his] own use." A. 58. Putting aside for the moment the issue of the direct and substantial chilling effect this condition will have on *any*

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[5] *See Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988), in which the Florida Supreme Court construed the state constitution to preclude its subject matter jurisdiction of those decisions of intermediate appellate courts that contain no "statement or citation effectively establishing a point of law upon which the decision rests," as is the case here.

thought Mr. Diana might have of putting pen to paper lest his writings be judged obscene later, the prohibitive aspect of this probation condition runs directly afoul of *Stanley v. Georgia*, 394 U.S. 557 (1969).

As held in *Stanley*, the First and Fourteenth Amendments prohibit the states from making the mere private possession of obscene material a crime. This Court explained that while states have legitimate interests in dealing with "the problem of obscenity" by regulating its "commercial distribution," *id.* at 563-64, it does not necessarily follow that obscenity is entirely beyond constitutional protection in all instances. In fact, the state's attempt to outlaw the possession of such materials in one's own home implicates not just First Amendment concerns, but privacy concerns as well.

> [W]e think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Stanley, 394 U.S. at 565.

Stanley makes plain the invalidity of the probation condition prohibiting Mr. Diana from privately possessing or creating obscenity. In response to the State's

argument that it had the right to protect citizens' minds from the allegedly ill effects of obscenity by outlawing its private possession, this Court said:

> We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.

Stanley, 394 U.S. at 565-66 (footnote omitted).

The individual's "right to read or observe what he [or she] pleases," even if obscene, a right "fundamental to our scheme of individual liberty," must necessarily extend to the individual's right to create his own reading material and his own drawings in his own home. Otherwise, the government may lawfully engage in "thought control," a proposition this Court has soundly rejected. *See also American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (state may not become "the great censor and director of which thoughts are good for us").

Evidently, the County Court below undertook no less a daunting task than the reformation of Michael Diana's mind. The County Court has prohibited Petitioner from merely possessing obscene material in the privacy of his own home – a condition that offends *Stanley* – and also has ordered him to "take a journalism ethics course," A. 25,51,59, although Petitioner was not convicted of "unethical journalism." As demonstrated below, jurisprudence prohibits the State from imposing this "thought control" on a citizen on the ground that he is a probationer.

B. The provision for warrantless searches for "obscene" material violates safeguards for speech and expression required by the First, Fourth and Fourteenth Amendments.

The provision for warrantless searches of Petitioner's living quarters during probation as an incident of enforcing the prohibition on possession or creation of obscenity is presumptively invalid and unconstitutional under the First, Fourth and Fourteenth Amendments.

Probable cause is not constitutionally necessary for a lawful search of a probationer's home, and this Court has upheld such warrantless searches upon "reasonable grounds" for the officer to believe a violation of probation is occurring. *Griffin v. Wisconsin*, 483 U.S. 868 (1987). *Griffin*, however, also teaches that a probationer's fundamental rights of thought and private expression cannot be infringed to the extent they are here. As *Griffin* makes clear, a criminal conviction and probationary status do not eviscerate all fundamental constitutional protections. The probation condition in this case violates *Griffin* in that it does not provide any safeguard, much less that of "reasonable grounds," against a search.

At issue in *Griffin* was a Wisconsin rule that allowed a warrantless search of a probationer's home upon mere "reasonable grounds." Florida does not have even that safeguard. In Florida, conditions of probation are set by the court and restrained only by the court's imagination and the principle that such condition is invalid, in the words of the Circuit Court Appellate Division, if it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself

criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979)." A. 14. *See also* Fla. Stat. § 948.03 (Supp. 1996) ("The court *shall* determine the terms and conditions of probation. . . . These conditions *may* include among them the following, . . . ") (emphasis supplied). Florida has no rules to guide the unfettered decision of a probation officer to search Petitioner's home for "obscene materials" and to seize materials that the untutored officer thinks might be obscene.[6]

Moreover, the materials for which the probation officer may search without a warrant are presumptively protected by the First Amendment. This Court has established that the standard Fourth Amendment analysis is heightened when First Amendment guarantees are implicated, as in the case of searches and seizures of allegedly obscene writings and pictures. *Walter v. United States*, 447 U.S. 649 (1980); *Roaden v. Kentucky*, 413 U.S. 496 (1973).

> [W]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a

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[6] New York is now responsible for supervising Petitioner's probation and, regardless of that state's rules, the supervision will be conducted pursuant to the Florida order, with its handwritten notation "warrantless searches by probation." Even were the receiving state to apply its own probation rules, Petitioner and those in his position should not be required to search out the most felicitous state for transfer, hoping his First and Fourth Amendment rights will be respected there.

> warrant in various circumstances), it is otherwise where materials presumptively protected by the First Amendment are involved. . . . It is "the risk of prior restraint which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials" that motivates this rule.

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 63-64 (1989) (citations omitted).

As they are not stripped entirely of Fourth Amendment protections, probationers are not stripped entirely of First Amendment rights simply because they have been convicted of crimes. *Porth v. Templar*, 453 F.2d 330, 334 (10th Cir. 1971) (holding invalid prohibition on probationer's expression of opinions about tax laws); *see also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991) (statute imposing financial burden on speech by convicted criminals about their crimes violates First Amendment).

Thus, infringements on First Amendment rights, including those of probationers, must be no broader than necessary to protect the compelling governmental interest advanced. As an incident of probation, arguably, the State could support a prohibition on Petitioner's distribution or sale of obscene material, the crimes of which he was convicted. However, the probation conditions here go much further: they directly infringe on Petitioner's rights to express his own thoughts, for himself, on paper in his own home. The probation condition prohibiting possession or creation of obscenity, coupled with the provision for warrantless searches, acts as a direct prior restraint on

the artist's private expression. Writing or even doodling puts him at risk that his probation officer will confiscate and read his writings and deem them obscene; drawing creates the risk of similar action, a risk not ameliorated by any procedural safeguards such as those described in *Freedman v. Maryland*, 380 U.S. 51 (1965).[7] The conditions of probation intrude too deeply into protected ground and should not be allowed to stand.

II. The definition of "obscene" material established in *Miller v. California* should not be extended to cartoons that could not be viewed as depicting any actual event, and that could not be considered hard core pornography created or displayed for commercial gain.

The jury's verdict below is not unassailable. It is within this Court's power, indeed, it is an appellate court's duty, to review the verdict for constitutional validity. *Jenkins v. Georgia*, 418 U.S. 153 (1974) (holding film *Carnal Knowledge* not obscene as matter of law). The jury and the lower courts in this case misapplied the standards established in *Miller v. California*, 413 U.S. 15 (1973), and Petitioner's conviction for violation of Fla. Stat. § 847.011, should be reversed.

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[7] The Florida Statutes mandate an officer who arrests a person for violation of § 847.011 "shall seize said obscene material and take the same into his custody to await the sentence of the court upon the trial of the offender." Fla. Stat. § 847.03 (1995). The Florida statutory scheme does not even adhere to this Court's long-standing insistence on pre-seizure due process in the cases of persons who are *not* probationers. Every law enforcement officer is thus a censor.

The need for appellate review by this Court is underscored by the nature of the material at issue here and what Petititioner did with it. First, the material itself is shocking, graphic and, concededly, tasteless under the norms of polite society. That was Petitioner's point. The annals of art history are littered with the outrage of the righteous over shocking, graphic, and assertedly tasteless art. The cardinals of the Roman Catholic Church, for example, were scandalized in the sixteenth century by the nudity in Michelangelo's "Last Judgment" in the Sistine Chapel in the Vatican. Robert Mapplethorpe's photographs were seen by many as disgusting assaults on religion, not to be countenanced. And while Petitioner is no Michelangelo or Mapplethorpe, even the French Impressionists were dismissed initially as vulgarists lacking in artistic skills. The *Miller* Court surely never intended its opinion to be used as the State's bludgeon in the hands of those all too willing to punish expression that makes them uncomfortable.

Second, the settled focus of obscenity jurisprudence, including *Miller*, its predecessors and its progeny, has been on the commercial display and distribution of portrayals of hard core sexual conduct for profit, factors completely absent here. The three-part definition of obscenity provided in *Miller* and the opinion's textual examples for its application address the State's power to regulate display of such material for "commercial gain" by "dealers" and those engaging in "public and commercial activities," where "films or pictures" are "exhibited or sold in places of public accommodation." *Miller*, 413 U.S. at 26-27. *Miller* itself arose in the context of a "mass mailing campaign to advertise the sale" of "hard core"

sexual images – a mode of dissemination by which the materials were "thrust by aggressive sales action upon unwilling recipients," unsolicited, carrying "a significant danger of offending the sensibilities of unwilling recipients or exposure to juveniles." *Miller*, 413 U.S. at 18-19. Thus the *Miller* test arose in a context and out of concerns and interests not presented here.

Moreover, opinions interpreting and applying *Miller* have done so consistently in the context of First and Fourth Amendment controversies over commerce in, or more than one isolated incident of display or sale of, live-action films, photographic depictions, and literary representations of hard core sexual activity in magazines and books intended for sale, distribution or exhibition to the public in exchange for money.[8]

At bottom is the question whether the *Miller* test should even be applied to hand-drawn art, paintings or other non-realistic, patently distorted and unrepresentative depictions of sex and violence that are not on public sale or display. Petitioner has not located any case since *Miller* upholding an obscenity conviction based on art not commercially sold or displayed and not of a representational nature. The *Miller* test was not designed for the

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[8] The Court's opinion in *Stanley* emphasized this paucity of non-commercial obscenity jurisprudence. *Stanley*, 394 U.S. at 561 n.6. This Court recognized a significant distinction between the societal concern over commercial distribution of material showing live sex and excretory functions, and the ramifications of imposing its jurisprudence on individuals having no involvement in the "obscenity trade." Accepting three dollars to cover the cost of photocopying cartoons hardly places Petitioner "in the trade."

circumstances here. Thus, individual cartoon artists, and non-mainstream self-publishers such as Petitioner – persons not involved in commercial obscenity and without the resources to battle censorship or withstand its effects – are without meaningful guidance in steering a course clear of an obscenity violation. Providing such guidance was a particular concern to this Court in *Miller*, and this case demonstrates the Court's concern was well founded.

Finally, it defies analysis to think how a hand-drawn and exaggerated, satirical image could meet the *Miller* definition without placing at risk of an obscenity prosecution every middle school or high school age child who has doodled patently offensive imagery on his notebook or desk. This Court in the past has been "particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions." *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988). Writing or drawing, even if offensive, nevertheless is protected because it is merely the expression of the artist's *idea* of the thing, and not the thing itself. "[A] book about slavery is not itself slavery, or a book about death by poison a murder." *American Booksellers*, 771 F.2d at 330. This Court should accept jurisdiction of this case to consider whether *Miller* was misapplied and the Petitioner was wrongly convicted. Petitioner submits that the First Amendment, at minimum, should protect the individual's right to create satirical, exaggerated hand-drawn images as expressions depicting his anguish or protest and to allow

another person who claims similar views or thoughts to view the images without risk of criminal prosecution of the artist.

Respectfully submitted,

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IN THE CIRCUIT COURT FOR THE
SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

MICHAEL DIANA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

Appeal No. CRC
94-7315 CFANO

Opinion filed May 31, 1996

Appeal from final judgment
County Court, Criminal Division,
Pinellas County
The Honorable Walter Fullerton

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ORDER AND OPINION

THIS CAUSE came before the Court on the Appellant's appeal of a County Court, Criminal Division, Pinellas County, final judgment after a jury verdict of guilty of

two counts of publication and/or sale and/or distribution of obscene material and one count of advertising for sale, publication, and/or distribution of obscene material. Upon review of the briefs of counsel and the Record on Appeal, the Court finds eight issues raised by the Appellant. The Court will discuss the issues in the order that they were presented in the briefs.

Issue I: ***Do Boiled Angel 7 and Boiled Angel Ate possess any serious literary, artistic, political or scientific value which render them not obscene?*** The Court finds that they do not.

Patently offensive drawings of sexual organs and sexual acts predominate in both publications. The drawings depict ejaculation, defecation, masturbation, castration, bestiality, oral and anal sex and rape. There are also written materials that describe sex with dead bodies, incest, sodomy, and rape.

Sex and obscenity are not synonymous, and the portrayal of sex is not by itself a sufficient reason to render a publication obscene. *Roth v. United States,* 354 U.S. 476, 77 S. Ct. 1304 (1957). On the other hand, obscene material is not protected by the First Amendment to the United States Constitution. *Miller v. California,* 413 U.S. 15, 22, 93 S.Ct. 2607, 2614 (1973).

In *Miller,* 413 U.S. at 25, 93 S.Ct. at 2615, the Court developed a three-pronged test for judging whether or not material is obscene. Section 847.001(7), Florida Statutes, defines "obscene" and tracks the guidelines set forth in *Miller*. "Obscene" means the status of material which:

> (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
>
> (b) Depicts or describes, in patently offensive way, sexual conduct as specifically defined herein; and
>
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Miller*, the Court gave a few plain examples of what a state statute could define for regulation under part "b":

(a) Patently offensive representations or description of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Miller, 413 U.S. at 25, 93 S.Ct. at 2615.

The *Miller* court also stated that the jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community and need not employ a national standard. *Miller*, 413 U.S. at 36, 93 S.Ct. at 2622.

Section 847.001(11), Florida Statutes, defines "Sexual Conduct" as follows:

> "Sexual Conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sado-masochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's

> clothes [sic] or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

"Sexual Conduct" includes sadomasochistic abuse, sexual bestiality, and sexual battery, which are defined in Subsections 8, 9, and 10 of the statute. This Court finds that virtually every type of sexual conduct listed in *Miller* and in Section 847.001(11) is portrayed in *Boiled Angel 7* and *Boiled Angel Ate*.

The jury determined that the Appellant was guilty of two counts of publication and sale and distribution of obscene material and one count of advertising for sale, publication, and distribution of obscene material. Although questions of appeal to prurient interest or of patent offensiveness are essentially questions of fact in state obscenity prosecutions, juries do not have unbridled discretion in determining what is patently offensive. The jury's verdict does not preclude further appellate review of the Appellant's assertion that his publications are protected by the First and Fourteenth Amendments to the United States Constitution. *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750 (1974).

In *Jenkins*, the Court had for review a case involving the film, *Carnal Knowledge*. The Court stated that nothing in the movie fell within either of the two examples given in *Miller* as material which may constitutionally be found to meet the patently offensive element of the *Miller* standards. The Court noted that while the subject matter of the movie was, in a broader sense, sex, and there were scenes in which sexual conduct, including ultimate sexual

acts, is understood to be taking place, the camera did not focus on the bodies of the actors at such times. In addition, there was no exhibition of the actors' genitals, lewd or otherwise, during these scenes. There were occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards. The Court held that because the film did not depict sexual conduct in a patently offensive way, it was not outside the protection of the First and Fourteenth Amendments. *Jenkins*, 418 U.S. at 162, 94 S.Ct. at 2755.

The Court finds that Appellant in *Boiled Angel 7* and in *Boiled Angel Ate* has depicted sexual conduct which the average person, applying contemporary community standards, would find, taken as a whole, appeals to prurient interest and which depicts or describes, in patently offensive ways, sexual conduct as defined in Section 847.001(11), Florida Statutes. Both of Defendant's publications are replete with references to and drawings of female and male genitalia, human sexual excretion, oral and anal contact, bestiality, specific sexual positions, sadomasochism, the turgid state of the male sexual organ, and sexual intercourse. The sexual acts depicted in Defendant's publications are defined as obscene acts in Section 847.001(7), Florida Statutes. Although not dispositive of the issue, state law is entitled to significant weight on the issue as to whether the community would be patently offended. *Skywalker Records, Inc. v. Navarro*, 739 F.Supp. 578, 593 (S.D. Fla. 1990).

The Supreme Court has defined "prurient" as "material having a tendency to excite lustful thoughts." *Roth*, 354 U.S. at 486 n. 20, 77 S.Ct. at 1310 n. 20. A thing is obscene if, considered as a whole, its predominant appeal

is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. *Roth*, 354 U.S. at 486 n. 20, 77 S. Ct. at 1310 n. 20, *Citing*, the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957).

The Titles, *Boiled Angel 7* and *Boiled Angel Ate*, indicate these materials' aim is titillation. The cover of Boiled Angel 7 showing an abused female child with illustrations of the Holy Bible across the top of the page and Appellant's introduction to this "Bible of Blasphemy and Filth" which he has prepared for all of you "Sick Fucks" invite the leer of the sensualist and show that the Appellant intended to appeal to the prurient interest. They exploit erotica solely for its prurient appeal.

The third prong of *Miller* is whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 25, 93 S.Ct. at 2615. As the Supreme Court said in *Pope v. Illinois*, 481 U.S. 498, 502, 107 S.Ct. 1919, 1921 (1987), "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."

Appellant testified at length about how he came to create his publications. He testified about his education, family, and other life experiences. The fact that Appellant had certain experiences or comes from a certain religious

background does not convert whatever he says or publishes into literary, scientific, or political speech. *Skywalker Records, Inc.* 739 F.Supp. at 594. The evident goal of the Appellant's publications is to portray shocking and graphic pictures of sexual conduct so it will be noticed. If the message is about victimization and that horrible things are happening in our society, as the Appellant alleges, then the Appellant should have created a vehicle to send his message that was not obscene. The Court finds that its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and it goes substantially beyond customary limits of candor in description or representation of such matters.

The Court finds that *Boiled Angel 7* and *Boiled Angel Ate* taken as a whole would not be found by a reasonable person to have serious literary, artistic, political, or scientific value. Rather, the publications when taken as a whole describe patently offensive hard core sexual conduct that renders them obscene.

Issue 2: ***Does the failure of Section 847.011, Florida Statutes, to define the geographic area of the relevant community for the purpose of determining contemporary community standards render the statute unconstitutional?*** The Court finds that it does not.

In *Miller*, the Court stated that the jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the *forum* community and need not employ a national standard. *Miller*, 413 U.S. at 36, 93 S.Ct. at 2622 (Emphasis supplied).

The Florida Supreme Court in *Davison v. State*, 288 So. 2d 483, 487 (Fla. 1973) held that it was constitutionally permissible to apply the contemporary community standards of a county, although not necessarily an entire county, in determining whether material is constitutionally obscene. In its discussion the Court noted that jurors are not chosen from a state-wide jury pool but on a county-by-county or circuit basis in Florida. The Sixth Judicial Circuit Court, which is the forum that applies in this case, has venue over Pinellas and Pasco Counties. The jury in this case was instructed to apply the contemporary community standards of Pinellas County. The material that is the subject of this case was distributed in Largo which is in Pinellas County.

A three-county geographic area was considered to be the relevant community in *Skywalker Records, Inc. v. Navarro*. The court in that case noted that the three counties shared a common geography on the eastern coast of Florida. They shared the beach front on the Atlantic Ocean including all of the common experiences that derive therefrom including the exposure to tourists from Florida, from other states, and from abroad. The area was also linked via common transportation by sea, land and air; and the people of those three counties interacted with each other both socially, culturally, and economically. The three counties also had a similar composition of rural and urban areas, and they had political ties. The federal court noted that the court's jurisdiction encompassed three more counties, but they did not share the integral connections that Broward, Dade, and Palm Beach Counties had.

The Appellant mailed his publications from a post office address in Largo, Florida, to a post office address in

Largo, Florida. Appellant was on notice by statute and case law that the relevant community could be a county or an area less than a county. The fact that "community" is not defined with geographic precision in the statute or the cases does not render the statute unconstitutional. As the Florida Supreme Court recognized "community standards" may be based upon a community such as a metropolitan area. Each community is its own community with standards which may or may not differ, or from time to time change. *Davison*, 288 So. 2d at 487.

Issue 3: ***Does the three part test of Section 847.001(7), Florida Statutes impose an unconstitutional ex post facto determination of obscenity?*** The Court finds that it does not.

Appellant argues that any determination or application of the *Miller* test must, by necessity, be determined "after the fact." He argues that as a predicate to conviction, a defendant should have to know that the charged material was, in fact, obscene. He further argues that the statute fails to satisfy the requirement of fair notice as to what conduct may be illegal, so that individuals will not unwittingly run afoul of the law. In addition, he states that the statute puts the finder of fact in a position where they not only have to determine whether the conduct in question broke the law by evaluating certain "elements", but that the statute requires the finder of fact to establish what those "elements" are in the first place. This argument has no merit, and has been addressed by appellate courts in the State of Florida. *State v. Long*, 544 So. 2d 219, 221 (Fla. 2d DCA 1989); *Haggerty v. State*, 531 So. 2d 364, 365 (Fla. 1st DCA 1988).

Issue 4: ***Did the State establish that the dominant theme of the subject materials taken as a whole appealed primarily to the prurient interest of a deviant sexual group?*** The Court finds that the State presented evidence from its expert, Dr. Sidney Merin, that the subject publications appealed primarily to the prurient interest of paraphiliacs; such as, sexual sadists, pedophiles, and voyeurs (R. 651). In addition, the publications, *Boiled Angel 7* and *Boiled Angel Ate*, were introduced into evidence. The traditional assistant of expert testimony, which is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand, is not needed by jurors in obscenity cases where the jurors view the materials themselves. *Paris Adult Theatre I, et al. v. Slaton*, 413 U.S. 48, 56, 93 S.Ct. 2628, 37 L.Ed. 2d 446, 456 (1973); *United States v. Thoma*, 726 F.2d 1191, 1200 (7th Cir. 1984). Because the State did introduce some evidence that the publications appealed primarily to a deviant sexual group, the State was entitled to a *Mishkin* instruction. Therefore, there was sufficient evidence in the record to support the jury's verdict.

Issue 5: ***Did the Court err by failing to require that the State demonstrate that Boiled Angel Ate existed as a completed work in order to sustain Appellant's guilt as to Count Three of the Information for advertising for sale, publication or distribution of obscene material at the time of the advertisement that was contained in Boiled Angel 7?*** The Court finds that it did.

It was necessary that *Boiled Angel Ate* exist prior to Appellant's advertisement for its sale or that Appellant know the nature of the materials that would be included in it. The definition of advertisement that was given by

the trial court for the purpose of Count Three of the Information was as follows:

> To "Advertise" means to make commercially publicly available, through affirmative or overt statements, deeds or actions, information regarding the means by which a person may acquire the item or service which is the subject of the alleged advertisement. (R. 249).

Appellant did not object to this jury instruction. Appellant stated in *Boiled Angel 7* that he needed money in order to do *Boiled Angel #8*, and he asked for cash donations or for his readers to purchase one of his videos. *Boiled Angel 7* in its introduction to its readers states that it was produced through donations from readers and contributors of articles or drawings or whatever other bits of cash he could get together to print it up. The implication is that readers who send contributions will receive a copy of *Boiled Angel #8*.

However, it is undisputed that *Boiled Angel Ate* did not exist at the time that Appellant advertised for its sale. Appellant stated that he did not know what it would contain when he advertised it in *Boiled Angel 7*. The State failed to prove the necessary element of scienter for the purpose of an obscenity prosecution: that Appellant had knowledge of the character of the materials contained in *Boiled Angel Ate* when he mailed *Boiled Angel 7* containing the advertisement. *Hamlin v. United States*, 418 U.S. 87, 121, 94 S.Ct. 2887, 2909 (1974). Therefore, the judgment of the trial court should be reversed on Count III.

Issue Six: ***Did the trial court err by failing to give the appropriate jury instructions requested by the defense, including but not limited to, the standard jury***

instruction on entrapment? The Court finds that it did not. In *Munoz v. State*, 629 So. 2d 90. 99 (Fla. 1993), the Florida Supreme Court set out three principles that arise under the test for the legislatively created entrapment defense of Section 77.201, Florida Statutes. The first question involves whether an agent of the government induced the accused to commit the offense charged. On this issue the accused has the burden of proof by a preponderance of the evidence. If that question is answered affirmatively, then a second question arises as to whether the accused was predisposed to commit the offense charged; that is, whether the accused was awaiting any propitious opportunity or was ready and willing, without persuasion, to commit the offense. On the second question the defendant initially has the burden to establish lack of predisposition. As soon as the defendant produces evidence of no predisposition, the burden shifts to the prosecution to rebut this evidence beyond a reasonable doubt. Admission of evidence of predisposition is limited to the extent it demonstrates predisposition on the part of the accused both prior to and independent of the government acts. The issue of predisposition must be submitted to the jury when the factual issues are in dispute or when reasonable persons could draw different conclusions from the facts. *Munoz*, 629 So. 2d at 100. In this case, the facts show that Detective Tezzas requested a copy of *Boiled Angel* and sent a three dollar money order. A copy of Detective Tezzas's letter was introduced into evidence. There is no representation that Detective Tezzas is a member of the "zine movement." It is clear that Appellant had indicated his willingness to sell his Boiled Angel publication at a definite price before Detective

Tezzas contacted Appellant. In response to Detective Tezzas's letter, Appellant sent Detective Tezzas a copy of *Boiled Angel 7*. When Appellant sent *Boiled Angel 7*, Detective Tezzas had not indicated that he was a member of the "zine community," and whether or not Detective Tezzas posed as a member of the zine community is irrelevant. The information in *Boiled Angel 7* about needing funds to do a *Boiled Angel #8* and testimony by the Appellant as to how his publications were produced show that Appellant was willing to distribute or sell both *Boiled Angel 7* and *Boiled Angel Ate* to anyone who indicated an interest in them and either sent him the price that he requested or contributed money or materials for his publications. Appellant had sold copies of *Boiled Angel 7* before Detective Tezzas inquired about a copy. Appellant testified that he sent copies of his "zines" to people all over the world. The fact that Appellant produced his publications with a specific audience in mind does not show lack of predisposition to publish, sell or distribute obscene materials. Therefore, the Court was correct in refusing to give the jury instruction on entrapment.

Issue Seven: ***Is the sentence imposed by the trial court illegal and does it impose an unconstitutional prior restraint on Appellant?*** The record is silent regarding any contemporaneous objections to the sentencing or motions challenging Appellant's sentence or the conditions of his probation before the trial court. The contemporaneous objection rule is applicable to conditions of probation if those conditions are legal. The contemporaneous objection rule is inapplicable to conditions of probation if those conditions are in fact illegal. *Larson v. State*, 572 So. 2d 1368, 1370 (Fla. 1991).

In determining whether a condition of probation is reasonably related to rehabilitation, a condition is invalid if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. *Rodriquez v. State*, 378 So. 2d 7, 9 (Fla. 2d DCA 1979). The Court finds as follows:

1. There was no evidence that Appellant used drugs or alcohol or had a substance abuse problem; therefore, the condition that Appellant submit to urinalysis, breathalyser or blood tests at any time requested by his probation officer has no basis in law or fact. *Daniels v. State*, 583 So. 2d 423 (Fla. 2d DCA 1991).

2. Dr. Merin testified that Appellant's publications would appeal to the prurient interests of a deviant sexual group, paraphiliacs, which included sexual sadists, pedophiles, and voyeurs. Dr. Merin stated that "Some pedophiles get excited when they see cartoons, and certainly, in the beginning stages, that could be true when they look at cartoons or drawings of sexual behavior with children. It then escalates into a need to actually get your hands on a real human being." (R. 684). Appellant maintained that the themes of his publications were victimization and anti-religion. Appellant also maintained that his publications were not sexual in nature and that they were not obscene. Appellant said that he drew on his experiences as a child who had a problem with bedwetting and that the anti-religious materials were partly a result of his being forced against his will to attend church. In his

introduction to *Boiled Angel* 7, Appellant calls the publication "Satanic filth." On the witness stand, he swore it was serious art.

The condition that Appellant undergo a mental health evaluation within thirty days of his sentencing and if mental health counseling were deemed necessary in the evaluation, to complete such counseling within ten months has some basis in the evidence that was produced at trial. It requires conduct that is reasonably related to the possibility of future criminality. It is also supported by the rationale that probation is an alternative to incarceration, and that supervision and control are used with the hope of rehabilitation rather than punishment.

3. The condition that Appellant was to have no contact with children or minors under the age of eighteen years also has a basis in the evidence produced at trial, as noted in paragraph two above. The constitutional rights of probationers are limited by conditions of probation which are desirable for the purposes of rehabilitation. *Rodriquez v. State*, 378 So. 2d at 9. Once Appellant has undergone a mental health evaluation, Appellant may petition the trial court for a modification of this term of his probation. *Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991).

4. The Appellant was prohibited from being in the possession of, or participating in, the creation of drawings or writings of obscenity. In addition, the sentence allows the warrantless search of Appellant's residence by the probation officer to ascertain if such drawings or writings are in the possession of or are being created by Appellant. There is no error in allowing the warrantless

search of Appellant's residence by his probation supervisor. *Elkins v. State,* 388 So. 2d 1314, 1316 (Fla. 5th DCA 1980). The constitutional rights of probationers are limited by conditions of probation which are desirable for the purposes of rehabilitation. *Rodriquez v. State,* 378 So. 2d at 9.

Issue 8: ***Was there prosecutorial misconduct sufficient to constitute reversible error?*** The Court finds that there was not.

Appellant's first example of prosecutorial misconduct is the prosecutor's comment when Appellant was testifying about the material titled "Dinner Date." Appellant testified that it dealt with the subject of date rape and showed what happened in real life. Appellant had testified that he had never been abused; therefore, he was not basing his testimony on personal knowledge and experience. Appellant was offering opinion testimony, and the Prosecutor objected on the basis that Appellant had not been qualified as an expert witness. Counsel for the Appellant immediately objected to the comment that "He's not an expert on rape, or perhaps he is. I don't know." and the objection was sustained. Although the comment may be objectionable, it could also be an invitation to counsel for the Appellant to qualify his witness before proceeding with that line of questioning. At any rate, the Court sustained the objection, so the jury knew the comment was inappropriate. In addition, it was Appellant's error in not laying a proper foundation for the testimony that invited the comment.

As to the Prosecutor's allegedly misrepresenting the law in appealing to the jurors' appreciation of community

tolerances in considering the serious literary, artistic, political or scientific value of *Boiled Angel 7* and *Boiled Angel Ate*, it fails to demonstrate reversible error. Appellant cites cases where the trial court gave confusing, misleading or incomplete jury instructions or overruled objections to prosecutors' misstatement of a reasonable doubt standard. In this case, the Judge stated that this was argument, and that he would instruct the jury on the law and the community standards that they must follow. In addition, the jury received written jury instructions containing the correct standard.

Appellant objects to the State's argument that serial killers, such as Danny Rolling, got started by viewing drawings such as those found in Appellant's publications, then progressed through pictures and movies, and later on began to create the scenes in reality. This was fair comment on testimony given by Dr. Merin, which came into evidence without any objection by counsel for Appellant. In addition, counsel failed to object during the closing argument. Therefore, this issue was waived and not preserved for appeal. *Lindsey v. State*, 636 So. 2d 1327 (Fla. 1994).

Appellant takes issue with the Prosecutor's comments that materials contained in Appellant's publications appeal to sexual sadists, and that Appellant is not proposing any cure for any problem, but is part of the problem. Appellant in his testimony took responsibility for all of the materials that he chose to include in his publications even though some of them were not created by him. Appellant chose to include the material by G.J. Schaeffer, from a work, titled *Killer Fiction*. At the end of the story, is a paragraph that states that G.J. Schaeffer is a

serial killer. In addition, there is an interview with G.J. Schaeffer that shows the author as Mike Diana. There are advertisements for *Killer Fiction, Beyond Killer Fiction,* and *Killer Serial, Rogue Cop.* At the end of the advertisement for *Killer Fiction,* is a statement that it is "Required reading for students of serial murder."

Both of Appellant's publications were accepted into evidence. Professor Watson and the other witnesses who had experience with "zines" stated that Appellant was not proposing a cure for any problem that he was just presenting it. Dr. Merin stated that the materials would appeal to sexual sadists. Comment on the evidence is permissible in closing argument.

In addition, Appellant takes issue with the Prosecutor's remarks about satanism. Some of the materials can be described as pro-satanism or anti-religious. Appellant stated that he was interested in satanic issues. Again, comment on the evidence is permissible in closing argument.

Appellant also challenges the Prosecution's argument on the credibility of Appellant's testimony. Appellant took the stand as a witness in is [sic] own behalf; therefore, his credibility was in issue. In *Boiled Angel 7,* Appellant included twelve rules on how to be a successful serial killer (R. 78). In his testimony, Appellant stated that he was depicting the violence and victimization that occurs in society, that he wanted to make society aware of how bad it is, and that he presented it graphically so they could not forget it. It was proper closing argument for the Prosecutor to point out the perceived inconsistencies

between what Appellant said and what his publications contained.

Given the overwhelming evidence of Appellant's publication of obscenity in this case, it cannot be said that the cumulative effect of Prosecutorial misconduct was sufficiently direct and egregious to cause the jury to return a different verdict that [sic] it would have returned absent any misconduct. *Budd v. State*, 477 So. 2d 52, 53 (Fla. 2d DCA 1985).

Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. The trial court is affirmed as to Count I and Count II, and the trial court is reversed as to Count III.

2. The condition that Appellant submit to urinalysis, breathalyser or blood tests at any time requested by his probation officer has no basis in law or fact and should be reversed.

3. All other conditions of probation are affirmed with the proviso that Appellant may petition the trial court for a modification of the term in his probation that prohibits contact with children or minors under the age of eighteen years after Appellant undergoes a mental health evaluation.

DONE AND ORDERED in chambers at Clearwater, Pinellas County, Florida on this ___ day of May 1996.

/s/ W. Douglas Baird May 31, 1996
W. DOUGLAS BAIRD
Circuit Judge, Appellate Division

Copies Furnished To:

The Honorable Walter Fullerton

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IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA APPELLATE DIVISION

MICHAEL DIANA,

Appellant,

vs.

Appeal No. CRC 94-7315 CFANO

STATE OF FLORIDA,

Appellee.

_____ /

ORDER DENYING MOTION FOR REHEARING

This cause came before the Court on the Appellant's Motion for Rehearing of this Court's decision in this cause. The Court, having reviewed the Motion and the authorities presented, finds that the motion has no merit. Accordingly, it is

ORDERED AND ADJUDGED that the Motion for Rehearing is denied.

DONE AND ORDERED in chambers at Clearwater, Pinellas County, Florida on this ___ day of June 1996.

Original Signed JUL 10 1996
W. DOUGLAS BAIRD
Circuit Judge, Appellate Division

Copies Furnished To:

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IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

JANUARY 9, 1997

MICHAEL DIANA, Petitioner(s),	)	
v.	)	Case No. 96-03301
STATE OF FLORIDA, Respondent(s).	)	

BY ORDER OF THE COURT:

ORDER

Petitioner having filed a First Amended Petition For Writ of Certiorari, upon consideration, it is

ORDERED that the First Amended Petition For Writ Of Certiorari is hereby denied.

DANAHY, A.C.J., and PARKER, and WHATLEY, JJ., Concur.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

/s/ William A. Haddad
WILLIAM A. HADDAD, CLERK

c: Luke Charles Lirot, Esq.
Andrew H. Kayton, Esq.
Attorney General

/pe [SEAL]

IN THE COUNTY COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

vs.

MICHAEL CHRISTOPHER DIANA,

Defendant.

Case No.: 93-07226-MM

(Filed Mar. 6, 1997)

_____ /

ORDER ON RULE 3.800 MOTION

THIS CAUSE having come before the Court on the Defendant's Motion to Correct, Reduce or Modify Sentence, filed pursuant to Rule 3.800, Florida Rules of Criminal Procedure, and the Court having reviewed the Motion, and having heard the argument of counsel and being otherwise fully apprised in the premises, it is thereupon:

ORDERED AND ADJUDGED that the Defendant's Motion to Correct, Reduce or Modify Sentence is GRANTED IN PART AND DENIED IN PART on the basis of the decision issued by the Circuit Court, sitting in its appellate capacity, and left undisturbed by the Second District Court of Appeal's denial of the Defendant's Petition for Writ of Certiorari. Addressing the components of the sentence imposed by the trial court, this Court orders the following be made the sentence of the Defendant herein:

a) the original sentence of thirty-six (36) months probation is reduced to a period of twenty-four (24) months probation,

b) the original fine of three thousand dollars ($3,000.00) is reduced to a fine of two thousand dollars ($2,000.00),

c) the original condition of performing community service at the rate of eight (8) hours per week for a period of thirty-six (36) months, a total of one thousand two hundred and forty-eight (1,248) hours is reduced to performing community service at the rate of eight (8) hours per week for a period of twenty-four (24) months, a total of eight hundred and thirty-two (832) hours,

d) that the condition of probation that the Defendant takes a journalism ethics course, remain a condition of the term of probation as modified in this Order,

e) that the condition of probation that the Defendant undergo a psychological evaluation, and treatment if necessary, remain a condition of the term of probation as modified in this Order,

f) that the condition of probation requiring random urinalysis, drug and alcohol screening be deleted as a condition of probation,

g) that the condition of probation prohibiting the Defendant from having contact with minors under the age of eighteen (18) years be deleted as a condition of probation,

h) that the request that the Defendant be allowed to serve his term of probation outside the State of Florida

and at his current place of residence in the State of New York is herein granted.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida this 5th day of March, 1997.

/s/ William H. Overton
Honorable
William H. Overton
County Court Judge

cc: Luke Charles Lirot, Esquire
State Attorney's Office

IN THE COUNTY COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

vs.

MICHAEL CHRISTOPHER DIANA,

Defendant.

_____ /

Case No.: 93-07226-MM

(Filed Mar. 6, 1997)

ORDER ON RULE 3.850 MOTION

THIS CAUSE having come before the Court on the Defendant's Motion to Vacate, Set Aside or Correct Sentence, filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure, and the Court having reviewed the Motion, and having heard the argument of counsel and being otherwise fully apprised in the premises, it is thereupon:

ORDERED AND ADJUDGED that the Defendant's Motion to Vacate, Set Aside or Correct Sentence is DENIED on the basis that the legal points and authorities submitted by the Defendant in said Motion were reviewed and evaluated by the Circuit Court on Appeal as well as the Second District Court of Appeal in a Petition for Writ of Certiorari filed by the Defendant. This Court will not vary the decisions of these appellate courts.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida this 5th day of March, 1997.

/s/ William H. Overton
Honorable
William H. Overton
County Court Judge

cc: Luke Charles Lirot, Esquire
State Attorney's Office

847.001 Definitions. – When used in this chapter:

* * *

(7) "Obscene" means the status of material which:

(a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;

(b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and

(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

* * *

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty. –

(1)(a) Any person who knowingly sells, lends, gives away, distributes, transmits, shows, or transmutes, or offers to sell, lend, give away, distribute, transmit, show, or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of

such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person knowingly to do or assist in doing any act or thing mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

* * *

(2) A person who knowingly has in his possession, custody, or control any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, film, any sticker, decal, emblem or other device attached to a motor vehicle containing obscene descriptions, photographs, or depictions, any figure, image, phonograph record, or wire or tape or other recording, or any written,

printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A person who, after having been convicted of violating this subsection, thereafter violates any of its provisions is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

* * *

CIRCUIT/COUNTY COURT,
PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. CTC 93-07226 MMANO

STATE OF FLORIDA (Filed Mar. 25, 1994)

vs

MICHAEL CHRISTOPHER DIANA

COUNT ONE
BOILED ANGEL #7

We, the Jury, find as follows as to the defendant in this case: (check one box only)

[X] Guilty of Publication and/or Sale and/or Distribution of Obscene Material, as charged.

[ ] Not Guilty

SO SAY WE ALL.

/s/ Carl Wirt
FOREPERSON OF JURY

March 25, 1994
DATE

CIRCUIT/COUNTY COURT,
PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. CTC 93-07226 MMANO

STATE OF FLORIDA

vs

MICHAEL CHRISTOPHER DIANA

COUNT TWO
BOILED ANGEL #ATE

We, the Jury, find as follows as to the defendant in this case: (check one box only)

[X] Guilty of Publication and/or Sale and/or Distribution of Obscene Material, as charged.

[ ] Not Guilty

SO SAY WE ALL.

/s/ Carl Wirt
FOREPERSON OF JURY

March 25, 1994
DATE

CIRCUIT/COUNTY COURT,
PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. CTC 93-07226 MMANO

STATE OF FLORIDA

vs

MICHAEL CHRISTOPHER DIANA

COUNT THREE
ADVERTISING

We, the Jury, find as follows as to the defendant in this case: (check one box only)

[X] Guilty of Advertising for Sale, Publication and/or Distribution of Obscene Material, as charged.

[ ] Not Guilty

SO SAY WE ALL.

/s/ Carl Wirt
FOREPERSON OF JURY

March 25, 1994
DATE

COUNTY COURT, PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION

[ ] ORDER WITHHOLDING ADJUDICATION OF GUILT AND PLACING DEFENDANT ON PROBATION

[X] JUDGMENT OF GUILT AND PLACING DEFENDANT ON PROBATION

STATE OF FLORIDA

vs.

Michal C. DIANA Case No. 93-07226 MMANO-E

This cause coming on this day to be heard before me, and you, the defendant, _____, being now present before me, and you having:

[ ] ENTERED A PLEA OF GUILTY TO

[ ] ENTERED A PLEA OF NOLO CONTENDERE TO

[X] BEEN FOUND GUILTY BY THE VERDICT OF A JURY OF

[ ] BEEN FOUND GUILTY BY THE COURT TRYING THE CASE WITHOUT A JURY OF

the offense of Publication/Sale/Distribution/Advertising Obscenity (3CTS)

INCARCERATION AND PROBATION

[ ] It appears to the Court that the ends of justice and the welfare of society would be best served by imposing jail sentence upon you and by placing you on probation after your have served a portion of such sentence.

It is hereby ordered and adjudged that you, for your said offense, be confined in the county jail for a term

of _____, that after you have served _____ of said term without deducting therefrom any allowance for gain time, you shall be placed on probation for a period of _____ under the supervision of the Salvation Army Correctional Services and its supervisors, such supervision to be in accordance with the laws of this state.

JUDGMENT OF GUILT AND PROBATION

[X] It appearing to the satisfaction of the Court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society does not require that you should suffer the full penalty authorized by law.

Now, therefore, it is ordered and adjudged that the imposition of sentence is hereby withheld and that you are hereby placed on probation for a period of 1 yr + 1 yr + 1 yr under the supervision of the Salvation Army Correctional Services and its supervisors.

ADJUDICATION WITHHELD AND PROBATION

[ ] It appearing to the satisfaction of the Court that you are not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that you should presently be adjudged guilty and suffer the penalty authorized by law.

Now, therefore, it is ordered and adjudged that the adjudication of guilt and imposition of sentence are hereby withheld, and that you are hereby placed on probation for a period of _____ under the supervision of the Salvation Army Correctional Services and its supervisors, such supervision to be in accordance with the laws of this state.

It is further ordered that you shall comply with the following conditions of probation:

(1) You will not change your residence or employment or leave the county of your residence without first procuring the consent of your probation supervisor.

(2) You will report in person each month, or an assigned date, to the Salvation Army Correctional Services unless otherwise directed by your probation supervisor.

(3) You will not use any drugs or narcotics unless prescribed by a licensed physician, or visit places where alcoholic beverages or drugs are sold unlawfully, nor will you use alcoholic beverages to excess.

(4) You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation.

(5) You will neither carry nor own any weapons without first securing the consent of your probation supervisor.

(6) You will work diligently at a lawful occupation and support any dependents to the best of your ability, as directed by your probation supervisor.

(7) You will promptly and truthfully answer all inquiries directed to you by the Court or your probation supervisor and allow the supervisor to visit your home, at your employment site or elsewhere, and you will comply with all the instructions he/she may give you, to include

any self-improvement program deemed necessary.

(8) You will pay forty dollars ($40) per month to cover the cost of this supervision and rehabilitation beginning on the date of this Court Order. This cost of supervision is required by Florida Statute 945.30 and will be complied with.

(9) The defendant is eligible for participation in the volunteer program of the probation agency. The participation of the defendant in the volunteer program shall be subject to availability of appropriate volunteers to work with the defendant and the probation agency.

(10) You will be responsible for any special conditions added by the presiding Judge: $3,000 @ 100^{00}/per month beg w/in 1 mo.

[X] (A) You will pay $50.00 per month towards court costs and thereafter towards the fine as assessed and ordered by this Court commencing with the first month of probation under the terms of this Order until both are paid in full.

[X] (B) Complete 8 hrs hours of public service or a community service work project ~~within ___ months~~ per week and pay an insurance fee in connection with this service.

[ ] (C) Make restitution to _____ in an amount agreed upon between you and your probation supervisor, or set by Court after a hearing which will be scheduled at your request as follows:

[ ] (D) Report to: [X] Jail [ ] Phase II Work Release [ ] Phase III Work Release Program to serve a term of ___ days, to begin 3/25/94 to be released 3/29/94 @ 9AM

[X] (E) You will receive a mental health evaluation within 30 days and, if counseling deemed necessary, complete counseling within 10 months, and assume all reasonable costs for counseling.

(F) You will receive an [ ] alcohol [ ] drug evaluation within ___ days and, if counseling deemed necessary, complete counseling within ___ months and assume all reasonable costs for such counseling.

[X] (G) You will submit to urinalysis, breathalyzer or blood tests at any time requested by your probation supervisor or the professional staff of any treatment center where you are receiving treatment, to determine possible use of alcohol, drugs or controlled substance.

[ ] (H) You will be tested for sexually transmitted disease at the Pinellas County Health Department within 30 days, complete treatment or counseling as determined by the test results within 45 days, pay a minimal fee for such testing and waive confidentiality.

[X] (I) First Degree Misdemeanor – No possession or creation (drawings, writings) of obscenity (probation may search without warrant)

[X] (J) Other – No contact with children or minors under 18 yrs – attend & complete journalism ethics course

[ ] (K) You will pay attorney fees and costs assessed against you in this case under Florida Statutes 27.56 and 925.036 on or before ____ or at least 60 days before your probation terminates, whichever occurs first.

[ ] (L) The defendant shall provide blood samples pursuant to the provisions of Florida Statute 943.325 to the Department of Law Enforcement. Said blood samples shall be taken by the staff of the Pinellas County Sheriff's Office at the Pinellas County Jail.

[ ] (M) The defendant shall complete a Life Management Counseling Program. Such program may include, but is not limited to, counseling on grief, anger, stress management, financial management, family relationships and communications, or other counseling deemed necessary by the chosen counselor.

[ ] (N) The defendant shall attend a Victim Impact Educational Seminar to be scheduled by the probation agency. The defendant shall remit a five ($5.00) dollar administrative fee to

the probation agency prior to attending the Victim Impact Course.

[ ] (O) The defendant will attend a Shoplifters Anonymous educational program at the defendant's expense. The fee for the program shall be determined by the probation agency however, in no event shall the fee exceed $55.00.

[ ] (P) The defendant shall enroll and participate in appropriate services of the S.A.L.T. program. Upon receipt of an executed payment plan listing Pinellas County cases in which a suspension has been issued, the Clerk of the Circuit Court shall cause the driver's license suspension(s) against the defendant's license in such case(s) to be removed.

THE DEFENDANT IS ADVISED THE RIGHT TO APPEAL

You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation and impose any sentence which it might have imposed before placing you on probation.

IT IS FURTHER ORDERED that the Clerk of this Court file this order in his office, record the same in the

minutes of the Court, and forthwith make available a copy of same to the probation supervisor of the Salvation Army Correctional Services.

IT IS FURTHER ORDERED that when you have reported to the Probation Officer and have been instructed as to the conditions of probation you shall be released from custody if you are in custody and if you are at liberty on bond, the sureties thereon shall stand discharged from liability.

DONE AND ORDERED IN OPEN COURT, this the 28th day of MARCH, 1994.

/s/ W. Fullerton
W. FULLERTON
JUDGE

I HAVE READ AND UNDERSTAND THE CONDITIONS OF MY PROBATION AS OUTLINED ABOVE.

/s/ Michael Diana
DEFENDANT

IN THE COUNTY COURT OF THE
SIXTH JUDICIAL CIRCUIT

CASE NO. 93-07226MMMANO-E

STATE OF FLORIDA (Filed May 31, 1994)

vs.

MICHAEL DIANA
_____/

ORDER STAYING SENTENCE AND
SETTING APPEAL BOND

Upon Defendant's, MICHAEL DIANA, request and after hearing argument on May 27, 1994, the Court Orders that:

1. A Notice of Appeal having been filed, the sentence is stayed until the appeal is complete.
2. A supersedeas appeal bond shall be posted in the amount of the fine, $3,000.00.
3. Hearing upon the allegation of probation violation is delayed pending appeal;

The Court shall review the appeal status on Monday, October 3, 1994, at 4:00p.m.

ORDERED this 31st day of May, 1994.

/s/ Walter Fullerton
WALTER FULLERTON
COUNTY COURT JUDGE

Copies to: SAO-E
Luke Lirot

5/23/91

Mike,

I'm tired of people fucking around with what I believe in. I saw your boiled ANGEL at a friends & its everything I think of & believe

Please send me a copy of Boiled Angel & other flyers you can. Its hard to find things to read because of people fucking with us. Here is a $3.00 money order like the copy said to cover cost.

Thanks

Mike Fiore
PO Box 2632
Largo Fl
34640

Mike Flore,

Thanx alot for your interest in my 'zine! Your the first person from Largo to ask for it so hope you find it to be cool! Is your box at the Largo post office near the middle school?! Write & let me know if ya like it! I had a hard time printing it cuz of the Asshole Largo printshops refused to do it!

Later, Mike Diana

5/30/91

Hey Bro,

I'm relativly new to the area so I don't know if I'm near that school but I am in Largo. I go back & forth from here to Fort Lauderdale. I'll be here for good in 2 weeks.

#7 was Far Fuckin out. Tasty menu too ha-ha Hey man send me your video. Here's 12 bucks. It's the Baked Baby Jesus video.

By the way, if I want to send a story for the angel what do I need to do? Also, is there any video around here? In Lauderdale I had some good connects but in moving here it'll be hard to get.

Thanks man

Mike Fiore
PO Box 2632
Largo Fl 34649

6/21/91

Hey Mike,

I sent ya a $12 money order about 2 weeks ago for your video baked Baby Jesus. I havn't gotten it yet. Any problem?

Also has your new Boiled Angel come out yet.

I'm in town now & cribbing with my old Bro Joe. He's a crazy fuck, into all sorts of shit. He's gonna write ya. He saw your satanic sex cafe & he's ready to eat. Ha Ha.

Let me know whats happening with the tape.

Thanks Bro

Mike Fiore
PO Box 2632
Largo Fl 34649

8/12/91

Hey Mike,

A month and a half ago I sent you a $12.00 money order for the video Baked Baby Jesus. I also wrote you 2 times since. What gives man. I aint no fucking cop or fucking church group. If you can't get the video I'll take the next issues of Boiled Angel. (if thats the problem). Come on & give me a break man. Thanks

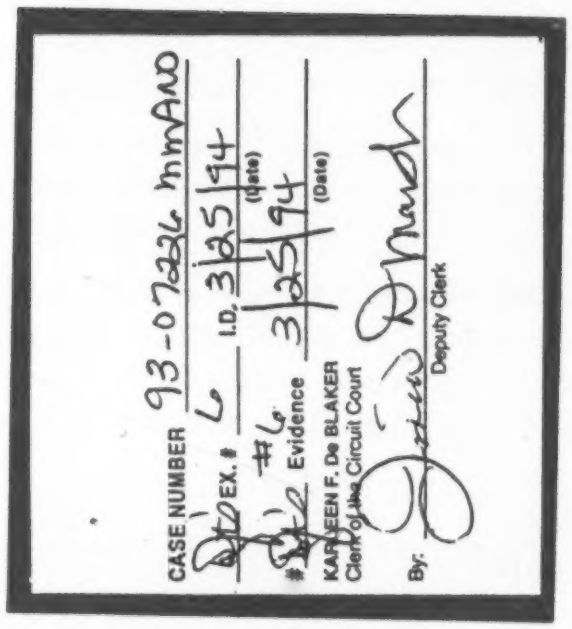
Mike Fiore
PO Box 2632
Largo
Fl 34649

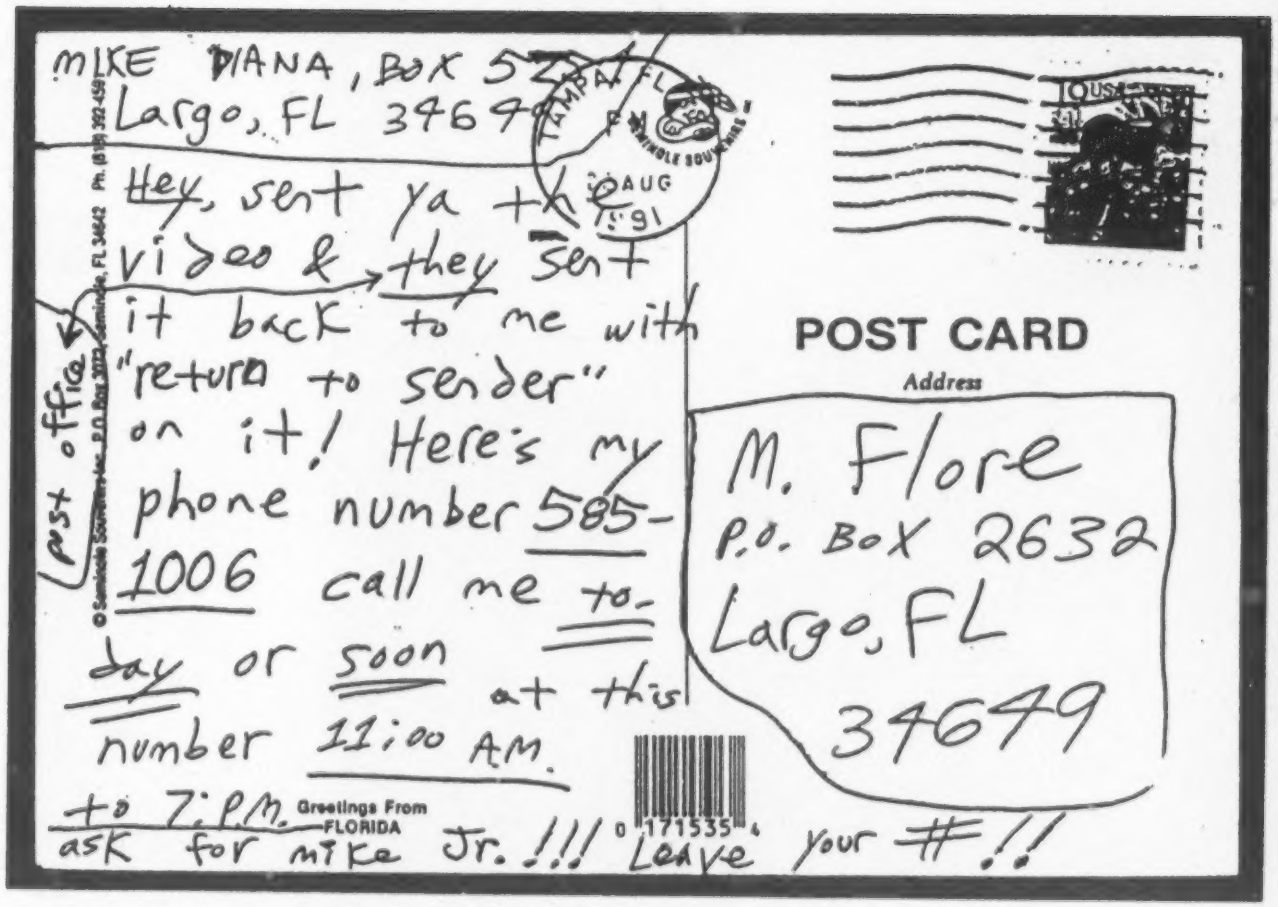
Hey Mike,

Just got back in town. Havent heard from you for a while. I want to get another [ ] Boiled Angel & that death scenes video. Let me know the cost & I'll send it.

I'm still cribbin w/ my buddy here & still using his P.O. Box I'm still grovin on the last vid. you sent. Ha Ha. Keep in touch

Mike Fiore
PO Box 2632
Largo 34649


CASE NUMBER 93-07226 mmAND
EX.# 6 I.D. 3/25/94 (Date)
Evidence #6 3/25/94 (Date)
KAREEN F. De BLAKER
Clerk of the Circuit Court
By: Deputy Clerk


MIKE DIANA, BOX 52[illegible]
Largo, FL 3464[illegible]
TAMPA FL
AUG
'91
Hey, sent ya the video & they sent it back to me with "return to sender" on it! Here's my phone number 585-1006 call me today or soon at this number 11:00 AM. to 7:P.M.
ask for MIKE Jr. !!! Leave your #!!
post office
Greetings From FLORIDA
POST CARD
Address
M. Flore
P.O. Box 2632
Largo, FL
34649

1-15-92

Mike,

Hi. Howz it going!? I've been going thru some problems with my gal friend so been depressed shit! Depression makes me pretty useless!

I just got "Boiled Angel #8" finished printing & it's $4.00 & I can do the Death scenes" for $6.00 on VHS tape & I'll put some other cool shit on the tape to! so $10.00 for the tape & B-A would do it! Hope to hear from ya soon!

Mike

P.O. Box 525
Largo, FL 34649

1/27/92

Hey Bro,

Here's 10 bucks for the new Boiled Angel & Death scene video. Sorry to hear bout your chick. It'll work out man. Keep in touch

Mike Fiore
PO 2632
Largo 34649

1-30-92

Hey Mike,

Thanx for the $10.00 here's "Death scenes" & a cool Japanese cartoon called "Day of the Demons"!

Let me know if you like the video & Boiled Angel #8 & let me know that you got it O.K.! So what do you do when you go to Ft. Lauderdale??

Later, Mike

3/4/92

Hey Mike,

Just came back to town again. was in Nassau & Ft. Laud. I have a little business down there still and I go to work on it while Im there. Got the tape. Great cartoon ha ha. The death scenes was good but I like those modern graphic ones like faces of death. You ever see them. They are far fuckin out ha ha. Hey man, you got any new boiled Angels. I wanna get yur latest. The last I got was #8. We need to get together man, once I finally get my roots down here. Tried to call you at that # you gave me but no answer.

Keep in touch

Mike Fiore
PO 2632
Largo Fl 34649

IN THE COUNTY COURT FOR
PINELLAS COUNTY, FLORIDA
COUNTY MISDEMEANOR NO. 93-7226MMANO

STATE OF FLORIDA)
vs.)
MICHAEL DIANA,)
Defendant.)

PROCEEDINGS: Sentencing Hearing

BEFORE: Honorable Walter A. Fullerton
County Court Judge

DATE: March 28th, 1994

PLACE: Misdemeanor Court Complex
Courtroom P
14255 49th Street North
Clearwater, FL

REPORTED BY: Linda A. Welsh,
Deputy Official Court Reporter.

[p. 2] APPEARANCES: STEWART BAGGISH, Esquire
Assistant State Attorney
Attorney for State of Florida

LUKE CHARLES LIROT,
Esquire
And
FRANK DE LA GRANA,
Esquire
200 Magnolia Drive
Clearwater, Fl 34624

* * *

THE COURT: Mr. Diana, come forward please with your counsel. Is there anything you would like to add? This is your case. You may make a comment about why we're here or certainly rely upon what your lawyer's announced for you. What have you thought about since Friday? Have you learned [p. 20] anything?

THE DEFENDANT: I know I didn't like it. It made me think twice about what I've done, what I've drawn, and what I will do in the future regarding my art.

THE COURT: What's that going to be?

THE DEFENDANT: I'm not going to do anything that would be considered obscene.

THE COURT: Is there anything else you would like to say?

THE DEFENDANT: No, your Honor.

THE COURT: My job as the judge is to fashion a fair sentence based upon the jury's verdict having found you guilty of these three charges on Friday after a several day trial. And what I'm going to do is fashion a sentence that, one, protects the community.

We got three files here, because there are many, many letters from citizens who don't want this type of material in their community. And, two, also punishes you for what you've done and the crime you committed and tries to rehabilitate you to be a resourceful and productive member of your community.

So, first, what I'm going to do is adjudicate you guilty of the offenses based upon the [p. 21] jury's verdict. I'm going to place you on probation for as long as I possibly can to be able to control your actions. So, therefore, I place you on probation for one year as to count one, consecutive to one year as to count two, consecutive to one year as to count three for a total of three years supervised probation with a misdemeanor supervising authority, with the Salvation Army.

And I order that you pay a fine and court costs to repay the taxpayers for what they've expended on these many hearings, the expert witnesses, the days in trial, and if the administrator orders, additional costs which exceed this. Order a $1,000 fine as to count one, consecutive to count two and three, for a total of $3,000 fine and court costs to be paid at the rate of $100 a month.

I'm going to find that the drawings certainly show to me that there's an angry young man here. There's a lot of anger that needs to be dealt with. I order a psychiatric evaluation within 30 days, and you will complete all recommended treatment to deal with that anger and redirect your talents in a positive way.

I'm going to direct that you maintain full [p. 22] time employment, five days a week, 40 hours a week, at least; and if you continue with your father's store, fine. But I'm going to order that there be eight hours of community service on your sixth day. You're going to be contributing to the community in a positive way with community service.

For the three-year period you're going to get one day a week off. You're going to be doing community service

when you're not working. I'm going to find you have a morbid mind and I'm going to order no contact with children or young people under 18. If you work in the store and child comes in, you remain behind the counter performing your job.

And I'm concerned that you held yourself out be a journalist, a cartoonist, a publisher. But there are professional media representatives right here in the courtroom. They know there are certain limits to what is protected and what the community standards call for. I don't think — you seem to have missed the whole message of that.

I order that you seek out and find a course in journalism ethics and perhaps the journalism ethics and professionalism of journalism. Now, the jury having convicted you of obscenity, I'm going to order that you not create in your written or [p. 23] drawings, even for your own use, obscene materials. And they will be subject to unannounced searches by the probation officer without a warrant to see that that's carried out.

Now, the jury's determined by the community standards that your work is obscene and the citizens want that work stopped and by this sentence I intend it to be stopped. I'm also going to find that so long as you're ceasing to create these articles and these drawings and you redirect your resources into a positive way by working hard and doing community service and learning about ethics and professionalism and you're not committing any new crimes, I will not impose any jail time.

As of tomorrow, March 30th, at 9 a.m. you will begin your probation sentences. Good luck. You have 30 days in

which to appeal the judgment and sentence and a lawyer could be appointed if you qualify. Good luck.

MR. LIROT: Thank you, your Honor.

THE COURT: All right. We now stand in recess.

(Whereupon, the proceedings were adjourned.)

STATE OF FLORIDA
COUNTY OF PINELLAS

I, Linda A. Welsh, Deputy Official Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record.

Dated this 3rd day of August, 1994.

/s/ Linda A. Welsh
Linda A. Welsh
Deputy Official Reporter

STATE OF FLORIDA
COUNTY OF PINELLAS

The foregoing certificate was acknowledged before me this 3rd day of August, 1994 by Linda A. Welsh, who is personally known to me.

/s/ Mindee S. Casey
Notary Public, State of Florida
My Commission Expires: ___

[SEAL]